

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Petition of AT&T Services, Inc. For)	
Forbearance Under 47 U.S.C. § 160(c) From)	WC Docket No. 16-363
Enforcement Of Certain Rules For Switched)	
Access Services And Toll Free Database Dip)	
Charges)	
)	

**REPLY COMMENTS OF
BIRCH COMMUNICATIONS, INC.; CBeyond COMMUNICATIONS, LLC;
GOLDFIELD ACCESS NETWORK, LC; KANSAS FIBER NETWORK, LLC; LOUISA
COMMUNICATIONS; NEX-TECH, INC.; AND
PENINSULA FIBER NETWORK, LLC**

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Date: December 19, 2016

TABLE OF CONTENTS

I.	There Is Near Universal Agreement the Petition Should Be Denied, Because the Relief Sought Cannot Be Granted in a Forbearance Proceeding	3
A.	Intercarrier Compensation Reform Proposals Should Be Considered in a Rulemaking Proceeding, Not a Forbearance Proceeding	3
B.	AT&T Lacks Standing to Request the Relief Sought	5
C.	All Suggestions that the Commission Adopt New or Modified Rules in this Proceeding Must Be Rejected	6
II.	The Record Also Fully Supports Denial of the Petition on Substantive Grounds	8
III.	Conclusion	10

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In accordance with the Commission’s Public Notice concerning the above-captioned matter,¹ Birch Communications, Inc.; Cbeyond Communications, LLC; Goldfield Access Network, LC; Kansas Fiber Network, LLC; Louisa Communications; Nex-Tech, Inc.; and Peninsula Fiber Network, LLC (collectively, the “Carrier Coalition”) submit these Reply Comments in opposition to the Petition of AT&T Services, Inc. (“AT&T”) for Forbearance Under 47 U.S.C. § 160(c) (the “Petition”).

As demonstrated in the Carrier Coalition’s Motion for Summary Denial and Opposition,² the Commission should deny the Petition in full—either summarily or on substantive grounds. The Carrier Coalition demonstrated that denial is warranted, because (1) the issues raised in the

¹ *Pleading Cycle Established for Comments on AT&T’s Petition for Forbearance from Certain Tariffing Rules*, WC Docket No. 16-363, Public Notice, DA 16-1239 (rel. Nov. 2, 2016).

² Motion for Summary Denial of and Opposition to AT&T’s Petition of Birch Communications, Inc.; BTC, Inc.; Cbeyond Communications, LLC; Goldfield Access Network, LC; Kansas Fiber Network, LLC; Louisa Communications; Nex-Tech, Inc.; and Peninsula Fiber Network, LLC, WC Docket No. 16-363 (filed Dec. 2, 2016) (“Competitive Carrier’s Motion for Summary Denial and Opposition”).

Petition should be addressed in the Commission’s Connect America Fund (“CAF”) proceeding, in which all intercarrier compensation reforms are being considered on a comprehensive basis,³ (2) the Petition lacks the required evidentiary and analytical support for a forbearance request, and (3) the Petition fails on substantive grounds, and if granted would cause significant disruption and uncertainty in the market for tandem switching, tandem-switched transport, and 8YY database query services.

The initial comments filed in response to the Petition overwhelmingly support these same conclusions. As discussed below, there is near universal agreement among the commenters⁴ that forbearance is the wrong vehicle for the reforms sought by AT&T, and that such issues should instead be taken up in the CAF proceeding. Even commenters that support certain reforms fully recognize that a forbearance proceeding is the wrong means to achieve them. Several parties add—and the Carrier Coalition agrees—that AT&T lacks standing to request the forbearance sought. For these same reasons, certain commenters’ requests for the adoption of new and/or amended rules must be rejected. Moreover, even if the Petition were considered on the substance, the record remains devoid of evidence to support the requested relief, and should be denied on this basis as well.

³ *Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing a Unified Intercarrier Compensation Regime; Federal-State Joint Board on Universal Service; Lifeline and Link-Up; Universal Service Reform—Mobility Fund*, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, CC Docket Nos. 01-92, 96-45, GN Docket No. 09-51, WT Docket No. 10-208 (collectively “CAF proceeding”), Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663 (2011) (“*USF/ICC Transformation Order*”), *aff’d sub. nom. In re: FCC 11-161*, 753 F.3d 1015 (10th Cir. 2014), *cert. denied*, 135 S. Ct. 2072 (2015).

⁴ All parties that filed on December 2, 2016 in this proceeding, whether they filed motions, oppositions, and/or comments, are referred to herein as “commenters.”

I. There Is Near Universal Agreement the Petition Should Be Denied, Because the Relief Sought Cannot Be Granted in a Forbearance Proceeding

The commenters overwhelmingly oppose AT&T's attempt to obtain self-serving intercarrier compensation reforms in a forbearance proceeding. These commenters present two threshold reasons upon which the Petition should be denied: (1) the public interest demands that the issues raised in the Petition be considered through the holistic approach of the CAF proceeding,⁵ and (2) AT&T, as the customer of the services at issue and not as the entity being regulated, lacks standing to seek forbearance under 47 U.S.C. § 160(c). For these same reasons, the Commission cannot adopt new or amended rules in a forbearance proceeding, and thus the suggestions of limited commenters that the Commission do so should be rejected.

A. Intercarrier Compensation Reform Proposals Should Be Considered in a Rulemaking Proceeding, Not a Forbearance Proceeding

In the *USF/ICC Transformation Order*, the Commission announced its objective of completing all intercarrier reforms through a holistic approach.⁶ Nearly every party filing comments in response to the Petition agrees that the Petition should be denied in full, so that all inter-related issues are properly addressed in the CAF proceeding.⁷

⁵ *Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing a Unified Intercarrier Compensation Regime; Federal-State Joint Board on Universal Service; Lifeline and Link-Up; Universal Service Reform—Mobility Fund*, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, CC Docket Nos. 01-92, 96-45, GN Docket No. 09-51, WT Docket No. 10-208 (collectively “CAF proceeding”), Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, ¶ 13 (2011) (“*USF/ICC Transformation Order*”), *aff'd sub. nom. In re: FCC 11-161*, 753 F.3d 1015 (10th Cir. 2014), *cert. denied*, 135 S. Ct. 2072 (2015).

⁶ *USF/ICC Transformation Order*, ¶ 13.

⁷ Comments of NTCA-The Rural Broadband Association, WC Docket No. 16-363, at 4-9 (filed Dec. 2, 2016) (“NTCA Comments”); Consolidated Communications Companies and West Telecom Services, LLC’s Motion for Summary Denial of and Opposition to AT&T’s Petition, WC Docket No. 16-363, at 6-12 (filed Dec. 2, 2016) (“Consolidated and West Telecom Motion and Opposition”); Opposition of HD Tandem, WC Docket No. 16-363, at 1-2 (filed Dec. 2,

For example, the Nebraska Rural Independent Companies explain that “AT&T should not be allowed to circumvent the Commission’s [Further Notice of Proposed Rulemaking in the CAF proceeding]” and that the Petition is merely an “effort to pre-determine the outcomes of issues already pending before the Commission” in its comprehensive rulemaking proceeding.⁸ HD Tandem likewise opposes the Petition for this reason, explaining that forbearance is the wrong vehicle for the relief sought by AT&T, because “[t]he procedural protections mandated for rulemaking proceedings are critical for ensuring that the [Commission’s] rules serve the public interest and do not cause unintended consequences.”⁹

Even parties supportive of reforms to address concerns raised by AT&T nevertheless conclude that the Petition should be denied on this basis.¹⁰ NCTA – The Internet & Television Association explains that “the preferred method for [implementing certain reforms] would be through a comprehensive rulemaking proceeding rather than the piecemeal forbearance AT&T seeks here.”¹¹ Inteliquent acknowledges that “a rulemaking would be a better forum to address the issues.”¹² CenturyLink likewise explains that implementing reforms through forbearance is

2016) (“HD Tandem Opposition”); Comments of NCTA – The Internet & Television Association, WC Docket No. 16-363, at 1, 4 (filed Dec. 2, 2016) (“NCTA Comments”); Comments of the Nebraska Rural Independent Companies, WC Docket No. 16-363, at 2-3 (filed Dec. 2, 2016) (“NRIC Comments”); O1 Communications, Inc.’s Opposition to Petition of AT&T Services, Inc. for Forbearance under 47 U.S.C. §160(c), WC Docket No. 16-363, at 4-6 (filed Dec. 2, 2016) (“O1 Opposition”); Opposition of Omnitel Communications, Inc., WC Docket No. 16-363, at 2 (filed Dec. 2, 2016) (“Omnitel Opposition”); Comments of Windstream Services, LLC on AT&T Petition for Forbearance, WC Docket No. 16-363, at 1-2 (filed Dec. 2, 2016).

⁸ NRIC Comments at 3.

⁹ HD Tandem Opposition at 2.

¹⁰ CenturyLink Opposition/Comments to AT&T Forbearance Petition, WC Docket No. 16-363, at 2-3 (filed Dec. 2, 2016) (“CenturyLink Opposition/Comments”).

¹¹ NCTA Comments at 1.

¹² Comments of Inteliquent *et al.*, WC Docket No. 16-363, at 7 (filed Dec. 2, 2016) (“Inteliquent *et al.* Comments”).

problematic, because it “would prohibit LECs from recovering the costs of...services from IXC without creating an alternative cost-recovery mechanism.”¹³

Therefore, the Petition should be denied so that all inter-related reforms and proposals may be considered through the holistic approach of the CAF proceeding. As O1 Communications, Inc. explains, “[r]ather than act in piecemeal fashion...in this proceeding in the context of [AT&T’s] priority list, the Commission should address these issues in the far reaching rulemaking aimed to consider the issues in the context of overall intercarrier compensation reform.”¹⁴ While reforms are being considered through the rulemaking process, the Section 208 complaint process remains available to AT&T to raise allegations of arbitrage or excessive rates. Indeed, given that the Petition is based on unsubstantiated allegations concerning the behavior of carriers in two states—rather than the behavior of LECs industry wide—across-the-board forbearance is even more inappropriate.¹⁵ Accordingly, the Petition should be denied.

B. AT&T Lacks Standing to Request the Relief Sought

Several commenters also point out that the Petition must be denied, because AT&T lacks standing to seek the forbearance sought.¹⁶ The Carrier Coalition agrees with these commenters

¹³ *Id.* at 3.

¹⁴ O1 Opposition at 5.

¹⁵ O1 Opposition at 6; *see also* Verizon Comments, WC Docket No 16-363, at 2-3 & 6 (filed Dec. 2, 2016) (noting problems in two states with certain carriers and sham 8YY calls handled by certain carriers); *see also* NCTA Comments at 1 (stating that a rulemaking proceeding “also would be the best way to consider AT&T’s unsubstantiated assertions regarding the level of charges for database queries”).

¹⁶ *See* James Valley Cooperative Telephone Company *et al.*’s Joint Motion for Summary Denial of and Opposition to Petition of AT&T Services, Inc. for Forbearance Pursuant to 47 U.S.C. § 160(c), WC Docket No. 16-363, at 2-4 (filed Dec. 2, 2016) (“James Valley *et al.* Motion and Opposition”); Opposition of the 8YY Origination Competitive Service Providers to the Petition of AT&T Services, Inc. for Forbearance under 47 U.S.C. § 160(c), WC Docket No. 16-363, at 4 (filed Dec. 2, 2016); Opposition of WTA – Advocates for Rural Broadband and Eastern Rural

and supports denial of the Petition on this basis as well. Specifically, a Section 10(c) petition is only available to a carrier that seeks the Commission to forbear from rules “with respect to *that carrier*...or any service offered by *that carrier*[.]”¹⁷ The Petition, however, does not seek to remove regulatory burdens from AT&T’s ILEC affiliates. Instead, the Petition is attempt by AT&T to change the regulatory treatment of switched access services—services that AT&T, as an IXC, purchases as a *customer*.¹⁸ As such, AT&T lacks standing to request the forbearance sought through a Section 10(c) petition.

C. All Suggestions that the Commission Adopt New or Modified Rules in this Proceeding Must Be Rejected

“[T]he essential nature of a petition for forbearance is that it is a petition for relief from regulation,” under which “[t]he petitioner asks the Commission to forbear from enforcing against it one or more rules or statutory provisions.”¹⁹ While the Commission may grant a Section 10(c) “in whole or in part,”²⁰ the Commission cannot use a forbearance proceeding to amend its

Telecom Association, WC Docket No. 16-363, at 3 (filed Dec. 2, 2016) (“WTA *et al.* Opposition”).

¹⁷ 47 U.S.C. § 160(c) (emphasis added).

¹⁸ See James Valley Cooperative Telephone Company *et al.* Motion and Opposition at 2-3 (noting that the Petition, at n.1, describes AT&T Corp. as “the entity that is billed and that [sometimes] pays the charges for the access services discussed in the Petition”). Nothing in the Petition suggests that AT&T’s ILEC affiliates are expressly seeking forbearance from the Commission’s tariffing rules that apply to them. Nor do AT&T’s ILEC affiliates provide any evidentiary support for the relief that AT&T the IXC requests. See *id.*

¹⁹ *In the Matter of Petition to Establish Procedural Requirements to Govern Proceedings for Forbearance Under Section 10 of the Communications Act of 1934, as Amended*, Report and Order, WC Docket No. 07-267, 24 FCC Rcd 9543, ¶ 30 (2009).

²⁰ 47 U.S.C. § 160(c).

existing rules.²¹ Rather, new or amended rules may only be adopted through the notice and comment process of a rulemaking proceeding.²²

However, some commenters that request denial of the relief sought under the Petition suggest that the Commission grant alternative relief in the form of new or amended rules. One group of commenters requests that the Commission deny AT&T's request for forbearance from rules that permit tariffed charges for 8YY database dips, but request that the Commission modify its CLEC benchmark rule to apply to such charges.²³ These commenters also suggest that, instead of granting forbearance from rules permitting tariffed charges for tandem switched transport on all calls to and from an access stimulating LEC, the Commission limit tariffed transport mileage services to one mile for such LECs.²⁴ Such alternative requests seek to establish new or amended rules cannot be granted in a forbearance proceeding, and must be rejected.²⁵

Other commenters suggesting alternative proposals to forbearance appear to recognize that such proposals are for consideration only in the rulemaking context. Peerless Network, Inc. proposes creation of a benchmark rule for 8YY database dips, but requests AT&T's Petition be

²¹ *New England Telephone and Telegraph Company and New York Telephone Company Petition for Forbearance from Jurisdictional Separations Rules*, AAD 96-66, 12 FCC Rcd 2308, ¶¶ 12-13 (1997) (denying the forbearance petition because it, in part, “goes beyond mere forbearance from regulation and instead requires that [the Commission] . . . amend [its] rules” and stating that “revisions to [its] rules are appropriately addressed in a rulemaking proceeding through which interested parties have the opportunity to offer constructive comment on how the Commission . . . can best address the needs of all affected parties.”).

²² *See id.* ¶ 13; 5 U.S.C. § 553(b) & (c).

²³ Inteliquent *et al.* Comments at 2-5.

²⁴ *Id.* at 5-8.

²⁵ In fact, these commenters later note that “[a] rulemaking would be a better forum to allow all interested parties to comment on, and the Commission to evaluate, [further reforms].” *Id.* at 8. Similarly, while NCTA suggests that the Commission consider the reforms proposed by AT&T under certain clarifications, NCTA ultimately acknowledges that the Commission should deny the Petition in its existing form and “focus instead on completing its comprehensive reform” of the intercarrier compensation regime. NCTA Comments at 4.

denied as it relates to those services.²⁶ CenturyLink likewise asks the Commission to consider “more targeted” reforms as an alternative to forbearance, while noting that all reforms are better addressed through the rulemaking process.²⁷

As shown, all such alternative proposals cannot be granted in this forbearance proceeding and instead must be considered through the rulemaking process. Indeed, the need to allow for consideration of all alternative proposals reinforces the point that all intercarrier compensation reforms be addressed through the holistic approach of the CAF proceeding, not through piecemeal forbearance requests. As such, all suggestions that the Commission consider alternative rules in this proceeding must be rejected.

II. The Record Also Fully Supports Denial of the Petition on Substantive Grounds

In addition to the procedural flaws addressed above, the Petition also lacks the evidentiary and analytic support to satisfy AT&T’s burden of proof. Many commenters request that the Petition be rejected on this basis as well.²⁸ As shown in the Carrier Coalition’s Motion for Summary Denial and Opposition, the Petition is devoid of evidence to support its assertions, and fails to state a *prima facie* case for forbearance.²⁹ Indeed, neither the Petition, nor any

²⁶ Peerless Network, Inc.’s Opposition to AT&T Services, Inc.’s Petition for Forbearance Under 47 U.S.C. § 160(c), WC Docket No. 16-363, at 3-4 (filed Dec. 2, 2016) (“Peerless Opposition”).

²⁷ See generally CenturyLink Opposition/Comments at 1-3.

²⁸ NTCA Comments at 11-14; Consolidated and West Telecom Motion and Opposition at 15-19; HD Tandem Opposition at 3 and n.5; James Valley *et al.* Motion and Opposition at 14; NCTA Comments at 4-5; O1 Opposition at 6; Omnitel Opposition at 7-10; Peerless Opposition at 10-13; WTA *et al.* Opposition at 4-5.

²⁹ Peerless Opposition at 10-11.

general support of it offered by others for that matter,³⁰ are sufficient to satisfy AT&T's burden of proof.³¹

The record also fully demonstrates that the permissive tariffing rules *are* necessary to ensure just and reasonable rates and to preserve competition in the market for tandem switching, transport, and 8YY database services. Several commenters demonstrate that flash-cut mandatory detariffing would jeopardize the ability of providers to collect payment for such services, and would embolden IXCs in their efforts to avoid paying for such services through aggressive billing disputes and self-help withholding.³² Such consequences would harm competition in the market for such services, as providers would face higher transaction costs and legal fees in a detariffed environment.

The limited commenters that offer modified or conditioned proposals under which the Petition might be supported (which as noted above could not be granted through forbearance in any event) likewise do not overcome this problem. For example, the proposal offered by Inteliquent *et al.*—*i.e.*, to reduce the amount of transport for which a tariffed charge may be assessed on traffic sent to or from an access stimulator—would likewise embolden IXCs to aggressively dispute and withhold payment for services under claims of third-party access stimulation.

This proposal likewise raises the same problematic logistical issues that several commenters explain would arise if the Petition were granted. In particular, tandem switching and transport providers would have no reasonable way of knowing whether any of their subtending

³⁰ Verizon, the only commenter to support all of the relief sought by AT&T, likewise provides no evidence to support its factual assertions. *See* Verizon Comments at 3-4 (providing no evidentiary support for its factual assertions concerning alleged traffic pumping).

³¹ *See* Competitive Carrier's Motion for Summary Denial and Opposition at 14-19.

³² WTA *et al.* Opposition at 5-8; Peerless Opposition at 3-4; O1 Opposition at 11-12.

end office LECs are engaged in access stimulation and therefore, these providers would not know when mandatory detariffing would be triggered.³³ Such a scenario would only make it more difficult to resolve disputes, which in turn would lead to increased uncertainty for all parties involved. The Petition should therefore be denied on substantive grounds as well, since AT&T has failed to meet its burden to satisfy the three-part statutory test that applies to Section 10(c) petitions.

III. Conclusion

For the foregoing reasons, and those presented in the Carrier Coalition's Motion for Summary Denial and Opposition, the Commission should deny the Petition in full.

Respectfully submitted,

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³³ See Peerless Opposition at 6 (explaining that “[t]he tandem provider could never determine whether a LEC satisfied the traffic triggers in § 61.3(bbb)(ii) under AT&T’s proposal”); Consolidated and West Telecom Motion and Opposition at 33.